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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
T. J. REUBEN, d.b.a. )  
Funky Broadway East, )  
Appellant, )  
v. )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
Respondent. )

PCHB No. 78-222

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of two \$250 civil penalties for odor allegedly in violation of respondent's Section 9.11(a) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Seattle, Washington, on November 1, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by his attorney, Joel A. C. Rindal. Respondent appeared by and through its attorney, Keith D. McGoffin. Reporter Marilyn Hoban recorded the proceedings.

WAH/DO

1 Marilyn Hoban recorded the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From  
3 testimony heard and exhibits examined, the Pollution Control Hearings  
4 Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this Board a  
8 certified copy of its Regulation I containing respondent's regulations  
9 and amendments thereto of which official notice is taken.

10 II

11 The appellant, T. J. Reuben, owns and operates a restaurant known  
12 as Funky Broadway East in Seattle, Washington. A featured specialty of  
13 the restaurant is barbecued meat cooked in a brick pit heated by an alde  
14 wood fire. This meat is cooked in a barbecue sauce. The emission from  
15 the cooking pit leaves the two-story building containing the restaurant  
16 via a chimney at the rear. Next door, there is a six-story apartment  
17 building. (See Exhibit R-1.)

18 The pungent smoke emission from the pit drifts against the  
19 neighboring apartment. While cooking was formerly conducted six days  
20 per week, appellant agreed to cook only three days per week, at  
21 respondent's suggestion, following several complaints of odor made to  
22 respondent by occupants of the apartment building. This was the practice  
23 at the times pertinent to this appeal.

24 On the three cooking days, Tuesday, Thursday and Saturday, cooking  
25 and smoke emission occurs both day and night. In the summer months,  
26 residents of the apartment must open their windows to obtain relief from

27 FINAL FINDINGS OF FACT,  
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1 the heat, and smoke from appellant's cooking enters the apartments of  
2 these residents. The effect of the smoke's odor grows over time. It  
3 has the smell of burnt grease and is nauseating to those constantly  
4 exposed to it. The odor is sufficient to awaken apartment residents in  
5 the night, and also to cause coughing.

### 6 III

7 Following numerous complaints regarding the cooking odor, respondent  
8 dispatched an inspector to the site on two occasions. On the morning  
9 of August 8, 1978, the inspector observed smoke from appellant's  
10 chimney entering one of the adjacent apartments as he stood within it.  
11 The means which the inspector used to describe the intensity of odor is a  
12 scale of 0-4 as follows:

<u>Rating</u>	<u>Description</u>
14 0	No detectable odor.
15 1	Odor barely detectable.
16 2	Odor distinct and definite, any unpleasant 17 characteristics recognizable.
18 3	Odor strong enough to cause attempts at avoidance.
19 4	Odor overpowering, intolerable for any appreciable time.

20 Within the apartment the inspector rated the odor of appellant's smoke  
21 as Number 2. The inspector discussed the problem with appellant,  
22 Mr. Reuben.

23 On August 10, 1978, this time at night, respondent's inspector  
24 again observed smoke from appellant's cooking and observed that it  
25 caused an odor within the apartment building. The inspector discussed  
the problem again with the appellant.

27 FINAL FINDINGS OF FACT,  
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1 The appellant received two Notices and Orders of Civil Penalty  
2 (Nos. 3968 and 3976) each alleging violation of respondent's Section  
3 9.11(a) and each assessing a civil penalty of \$250 (total \$500). From  
4 these, appellant appeals.

5 IV

6 Residents of buildings on the opposite site of, or somewhat farther  
7 away from, the restaurant are not adversely affected by the cooking odors.  
8 Appellant has no prior record of violating respondent's regulations.

9 V

10 Appellant's cooking pit contains a grease filter, but no filter  
11 for smoke or odor. Appellant has sought out a smoke-odor filtering  
12 system, but has found that the pitched design of the building's roof  
13 makes installation of such a filter difficult or impossible. He  
14 therefore proposes to construct a flat-roofed addition which would  
15 house a new cooking pit and smoke-odor filter.

16 VI

17 Any Conclusion of Law which should be deemed a Finding of Fact is  
18 hereby adopted as such.

19 From these Findings, the Pollution Control Hearings Board comes  
20 to these

21 CONCLUSIONS OF LAW

22 I

23 Respondent alleges that the odor from appellant's cooking violated  
24 Section 9.11(a) of respondent's Regulation I which states:

25 It shall be unlawful for any person to cause or permit the  
26 emission of an air contaminant or water vapor, including an air  
contaminant whose emission is not otherwise prohibited by this

27 FINAL FINDINGS OF FACT,  
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1 Regulation, if the air contaminant or water vapor causes  
2 detriment to the health, safety or welfare of any person, or  
causes damage to property or business.

3 Section 1.07 defines "air contaminant" to include "odorous  
4 substance." Section 3.29 allows assessment of a civil penalty of up  
5 to \$250 per day for each violation of a regulation of the respondent.

## 6 II

7 We conclude that the odor emanating from appellant's cooking on  
8 August 8 and 10, 1978, violated respondent's Section 9.11(a). Such  
9 odor constituted an "unreasonable interference with enjoyment of life  
10 and property" and therefore "caused detriment to . . . the welfare" of  
11 the apartment residents. Boulevard Excavating, Inc. v. Puget Sound  
12 Air Pollution Control Agency, PCHB No. 77-69 (1977) and Cudahy Company  
v. Puget Sound Air Pollution Control Agency, PCHB 77-98, et al. (1977).  
14 The primary cause of this violation is not any fault pertaining to  
15 cooking skill but, rather, the direct proximity of the pit chimney to  
16 the apartment building next door coupled with the absence of a smoke-odor  
17 filter.

18 Because appellant has no prior record of violations of respondent's  
19 regulations and because he has stated his intent to install an addition  
20 allowing use of a smoke-odor filter, the penalties should be mitigated  
21 by suspension on condition that a smoke-odor filter be installed.

## 22 III

23 Any Finding of Fact which should be deemed a Conclusion of Law is  
24 hereby adopted as such.

25 From these Conclusions, the Board enters this

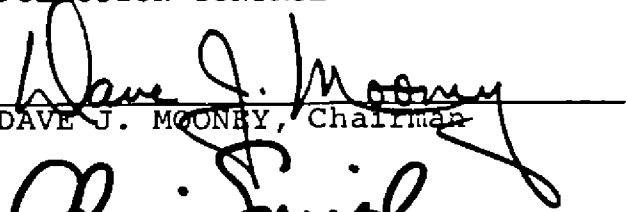
27 FINAL FINDINGS OF FACT,  
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ORDER

The violations (Nos. 3968 and 3976) are each hereby affirmed, provided however, that both civil penalties (total \$500) are suspended on condition that appellant install an appropriate smoke-odor filter on the restaurant cooking pit prior to June 1, 1979.

DATED this 29<sup>th</sup> day of November, 1978.

POLLUTION CONTROL HEARINGS BOARD

  
DAVE J. MOONEY, Chairman

  
CHRIS SMITH, Member

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